IN THE SUPREME COURT OF THE STATE OF MONTANA
DA-13-0536

MARTIN MULIPA IOSEFO

Defendant and Appellant,

v.

CITY OF MISSOULA

Plaintiff and Appellee.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Fourth Judicial District, Missoula County
Cause No. DC-13-92, Honorable Edward Mclean

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE ISSUES

1. Should Mark Fiorentino's citizen's arrest of Martin Iosefo be suppressed as a matter of law because Mr. Fiorentino did not possess the requisite probable cause to make the arrest?
2. Did the district court misapprehend the evidence when it substituted its judgment of probable cause for the judgment of the facts and circumstances personally known to Mr. Fiorentino at the time he arrested Martin?

STATEMENT OF THE CASE

Mark Fiorentino, an off-duty, out-of-jurisdiction peace officer arrested Defendant Martin Iosefo without identifying the basis for arrest. After Martin's arrest, police arrived, investigated at the scene which then resulted in charges of Aggravated Driving Under the Influence, Unlawful Breath Test Refusal, and Careless Driving.

On November 16, 2012, Martin filed a Motion to Suppress contending Mr. Fiorentino lacked authority or basis to make the arrest. Following briefing and a hearing, the municipal court denied the Motion. Martin then entered a conditional plea of guilty to Driving Under the Influence preserving his argument for appeal to the district court. Following further briefing, the filing of the electronic transcript, and oral argument, the district court affirmed the municipal court's Order in its *Order*

re: Municipal Appeal. It is from this *Order* that Martin appeals to the Supreme Court.

STATEMENT OF THE FACTS

Martin was arrested shortly after 3:00 a.m. on August 26, 2012, by Mark Fiorentino in Missoula's downtown parking garage during the River City Roots Festival. *Order re: Municipal Appeal*, p. 4:15-16, 1:21 (June 17, 2013). At the time of arrest, Mr. Fiorentino was employed as a peace officer in Lake County, Montana, but was moonlighting as an off-duty, out-of-jurisdiction police officer working as a private security guard for Black Knight Security ("BKS"). *Id.* at p. 1:23-25. A temporary barrier had been strung across the usual exit of the parking garage to redirect traffic. *Id.* at p. 1:21. The "barrier" was yellow caution tape and a temporary barricade. Mr. Fiorentino observed Martin drive through the tape and bump into the temporary barricade. *Id.* at p. 1:25 – 2:2.

Mr. Fiorentino arrested Martin by threatening to pull his weapon twice. See *Id.*at p. 4:11-16. Mr. Fiorentino never identified the basis of arrest and in fact never identified to law enforcement the basis of his arrest of Martin. See *Municipal Court Tr.*, (January 4, 2014).

In effecting the arrest, Mr. Fiorentino repeatedly directed Martin to stay in the pickup, attempted to handcuff Martin, attempted to "contain[ed]" Martin on the ground, and twice threatened the use of deadly force by pulling his gun in order to

cause Martin to cease any attempt to leave. See *Municipal Court Tr.*, (January 4, 2013); *City's District Court Response Brief* at p. 2 (March 14, 2013). Even the City admits that there is no evidence that Mr. Fiorentino was conducting a welfare check. *City's District Court Response Brief*, at p. 2. This same trained peace officer denied to City law enforcement dispatch any observation or conclusion that Martin was intoxicated or under the influence of an intoxicating substance and never articulated any basis for Martin's arrest. *Order re: Municipal Appeal*, p. 4:22-23. Later, Missoula peace officers arrived, conducted an investigation through field sobriety tests, and eventually booked Martin for misdemeanor Aggravated Driving Under the Influence. *Id.* at p. 1:22. Martin was also cited for misdemeanor Careless Driving for striking the temporary barricade. *Order re: Municipal Appeal*, p. 1:22-23. This charge was dismissed.

STANDARD OF REVIEW

The Montana Supreme Court reviews a district court's denial of a motion to suppress to determine if the findings of fact are clearly erroneous and its interpretations of law are correct. *State v. Updegraff*, 2011 MT 321, ¶ 24, 363 Mont. 123, 267 P.3d 28.

SUMMARY OF THE ARGUMENT

Martin Iosefo requests this Court answer whether an arrest by an out-of-jurisdiction peace officer acting upon particularized suspicion is permissible. This

case presents a question of law previously and intentionally left unanswered by this Court. See *Updegraff* at ¶ 55. This same private citizen detained Martin until on-duty, in-jurisdiction police conducted an investigation resulting in probable cause for Martin's arrest of Driving Under the Influence. Consequently, since Martin's arrest was illegal, the Missoula City police officers' after-acquired evidence upon the illegal investigation must be suppressed.

Statute permits an out-of-jurisdiction peace officer to arrest if a private citizen would have sufficient ground to make that same arrest. Montana case law also permits arrest by out-of-jurisdiction peace officers who develop probable cause following a welfare check. Neither fact pattern exists here. Instead, the out-of-jurisdiction peace officer expressly disclaimed to Missoula law enforcement dispatch probable cause for any arrestable offense. Stated another way, the officer denied personal knowledge of facts and circumstance sufficient to warrant a reasonable person to believe that someone was committing or had committed an offense requiring immediate arrest.

Further, the district court inappropriately substituted its judgment of probable cause for that of the detaining officer's expressed personal knowledge of the facts and circumstances. The district court's hindsight finding of probable cause fails to adhere to the probable cause standard applicable to arrests by out-of-jurisdiction peace officers.

The district court's misapprehension of the evidence also failed to focus on the facts known personally to Mr. Fiorentino when he arrested Martin, which is the only basis for probable cause. Martin's illegal detention was then used to conduct an illegal investigation resulting in his booking by on-duty peace officers. Since the district court imputed evidence of impairment discovered *after* Mr. Fiorentino's arrest, and contrary to Mr. Fiorentino's personal knowledge, probable cause was never established empowering Mr. Fiorentino to make the original arrest.

ARGUMENT

I. The district court's interpretation of Mont. Code Ann. § 46-6-502 is incorrect because out-of-jurisdiction peace officer Mr. Fiorentino lacked probable cause to arrest Martin for the non-jailable misdemeanor offense of Careless Driving.

Martin's arrest did not fall within the exceptional circumstances permitting a warrantless arrest by an out-of-jurisdiction peace officer limited to arrests pursuant to the authority of § 46-6-502. The seminal case on the arrest authority possessed by out-of-jurisdiction peace officers is *State v. Updegraff*, 2011 MT 321, 363 Mont. 123, 267 P.3d 28. *Updegraff* recognized that out-of-jurisdiction peace officers have the same authority to arrest as any other private citizen pursuant to § 46-6-502(1). *Id.* at ¶¶ 45, 46.

Montana's private citizen arrest statute permits arrest when there is probable cause to believe an offense has been committed and circumstances necessitate immediate arrest:

> **Arrest by private person.** A private person may arrest another when there is probable cause to believe that the person is committing or has committed an offense and the existing circumstances require the person's immediate arrest. The private person may use reasonable force to detain the arrested person. § 46-6-502(1).

Floyd Updegraff was convicted of felony DUI after he was discovered by an on-duty, out-of-jurisdiction peace officer parked in a day-use only lot around 1:00 a.m. Peace officer Francine Janik approached the Defendant's vehicle to perform a welfare check on the Defendant. Once she roused the initially unresponsive Defendant, she observed numerous beer cans, noted the Defendant's eyes were bloodshot and his speech was slurry, and smelled a strong odor of alcohol emanating from the Defendant and his car. *Updegraff* at ¶¶ 10 - 12. Officer Janik requested the Defendant to step outside his vehicle, produce his driver's license, and submit to standardized field sobriety tests, which he refused. *Id.* at ¶¶ 12, 13. Subsequently, a second on-duty, out-of-jurisdiction peace officer, Deputy Michael Wharton, responded and attempted to process the DUI investigation, but the Defendant continued to refuse to cooperate. Deputy Wharton placed the Defendant in handcuffs and informed him that he was under arrest. *Id.* at ¶ 14. Since out-of-jurisdiction peace officers do not have less authority to arrest than a private citizen, and Deputy

Janik approached the vehicle to perform a welfare check, an action any private citizen may perform, this Court determined the arrest and subsequent investigation was proper. *Id.* at ¶ 57.

According to *Updegraff*, an out-of-jurisdiction peace officer's authority to arrest arises only:

> ...if the circumstances would give a private person sufficient grounds to make an arrest, i.e., if there is probable cause to believe that a person is committing or has committed an offense and the existing circumstances require the person's immediate arrest. *Id.* at ¶ 52.

Updegraff also reaffirmed that probable cause exists when facts and circumstances are sufficient to warrant a reasonable person to believe a crime is or has been committed. *Id.* at ¶ 60 (citing *State v. Williamson*, 1998 MT 199, ¶ 12, 290 Mont. 321, 965 P.2d 231, overruled on other grounds). Thus, § 46-6-502(1) identifies the two elements for arrest as: the existence of probable cause and the existence of circumstances that require immediate arrest. Circumstances which would require a person's immediate arrest are based upon public safety, not for criminal investigative purposes. *Updegraff* at ¶ 33.

Martin's case differs significantly from *Updegraff* because as conceded by the City, Mr. Fiorentino was not engaged in a welfare check of Martin. *City's District Court Brief*, at p. 2. Instead, the City asserts Mr. Fiorentino's motivation to arrest Martin was because Martin "exposed pedestrians and vendor booths to the threat of injury and damage from [Martin's] actions." *City's District Court Brief*, at p. 2.

This statement is the classic basis for authorizing a detention based on particularized suspicion. § 46-5-401(1). Mr. Fiorentino was therefore not acting under the community caretaker doctrine approved in *Updegraff*.

Martin's case also differs from *Updegraff* because Mr. Fiorentino never articulated to law enforcement dispatch or the on-duty police officers upon their arrival any evidence, knowledge or cause of Martin's breach of the yellow tape or bumping into the barrier as probable cause of an offense. The record is devoid of common facts relied on by officers arresting persons for impaired driving such bloodshot eyes, slurred speech, the presence of beer cans, the odor of an alcoholic beverage, or other indicia that established probable cause for an arrestable offense.

A. Mr. Fiorentino's arrest should be suppressed because out-of-jurisdiction peace officers should not have authority to arrest defendants for non-jailable offenses.

This Court has recognized the hybrid characterization of an off-duty or out-of-jurisdiction peace officer. *Updegraff* at ¶ 50. On the one hand, out-of-jurisdiction peace officers are not permitted to make arrests or perform criminal investigations which are expressly limited to only on-duty, in-jurisdiction peace officers. *Id.* at ¶ 45. On the other hand, an out-of-jurisdiction peace officer is always a peace officer, even when off-duty or out-of-jurisdiction. *Id.* at ¶ 49. This Court has characterized an out-of-jurisdiction peace officer as never ceasing to "be" a peace officer, yet sometimes must cease "acting" like one. *Id.*

Of course, an out-of-jurisdiction peace officer does not have *less* authority to arrest than a private citizen. *Id.* at ¶ 50. But neither does an out-of-jurisdiction peace officer have *more* authority than a private citizen. *Id.* at ¶¶ 50-52. *Updegraff* demands out-of-jurisdiction peace officers meet the two-fold arrest standard applicable to any private person; *i.e.* probable cause and circumstances that require immediate arrest. If the standard is met, the officer may then follow procedures allowed by peace officers to process an arrest, including further investigation. *Id.* at ¶¶ 50, 52. Here, there was no probable cause, only suspicion. *Order re: Municipal Appeal* at p. 5:8-18.

Under Montana's Constitution, peace officers are not allowed to arrest citizens for non-jailable offenses, unless the circumstances justify immediate arrest. *State v. Bauer*, 2001 MT 248, ¶ 33, 307 Mont. 105, 36 P. 3d 892. The mere fact of careless driving *without more* does not justify an arrest. See *Id.* ¶ 33. As argued below, Montanans are afforded greater protection under Montana's Constitution than under the Federal Constitution because of the enumerated right of privacy and strengthened right to be free from unreasonable searches or seizures absent probable cause, thus justifying a more stringent standard for arrest based upon traffic stops. *See Id.*, MT. Const. art. 2, §§ 10, 11.

As a trained peace officer, Mr. Fiorentino knows Careless Driving is a non-jailable offense. Mont. Code Ann. § 61-8-302 *cf.* § 61-8-711. He is also charged

with knowing that on-duty officers do not have authority to arrest individuals for non-jailable offenses. *Bauer* at ¶ 33. Certainly, private citizens do not have authority under § 45-6-501(1) to arrest another citizen- -much less threatening to do so using deadly force—for running a red light, speeding, failure to signal a left turn, or any other enumerable traffic offenses, yet this is the precise issue before this Court.

Even an on-duty, in-jurisdiction peace officer could not have arrested Martin for mere Carless Driving, although admittedly, an on-duty officer would have reason and authority to conduct an investigation legitimately based on particularized suspicion. No similar power to investigate exists under § 45-6-502. *Updegraff* at ¶ 33. Neither a private citizen nor an out-of-jurisdiction peace officer however well trained, can arrest upon particularized suspicion in order to conduct an investigation. See *Updegraff* at ¶ 45.

In contrast, an on-duty, in-jurisdiction may detain on particularized suspicion in order to conduct an investigation. § 46-5-401(1). But here Mr. Fiorentino was neither on-duty nor in-jurisdiction. Consequently, Mr. Fiorentino lacked authority to investigate the cause of Martin's "careless" driving in the absence of Mr. Fiorentino's belief of the need for a welfare check, which even the City acknowledges was not Mr. Fiorentino's motive. *City's District Court Response Brief*, at p. 2. Martin's arrest was therefore illegal, unless arrest for particularized suspicion is the new standard in Montana.

The facts here parallel the discussion of "particularized suspicion" found in *State v. Graham*, 2007 MT 358, ¶ 25, 340 Mont. 366, 175 P.3d 885. According to *Graham*, the on-duty peace officer noticed apparent sexual behavior in a vehicle stopped on the side of a county road. As the officer approached in order to "discourage" the behavior, she noticed a beer near the driver's door and upon questioning determined that Graham showed signs of alcohol impairment. The *Graham* Court specifically recognized that erratic driving behavior as the type of behavior that gives rise to "particularized suspicion" as distinct from probable cause. *Id.* at ¶ 16. As in *Graham*, Martin's driving merely gave rise to a particularized suspicion and nothing more. See *Order re: Municipal Appeal* at p. 5:8-18.

While Mr. Fiorentino may have had a "particularized suspicion" of an arrestable offense due to Martin's driving behavior, he was not free to *act* like an on-duty peace officer and detain Martin for the purpose of conducting an investigation upon his particularized suspicion. *Updegraff* at ¶ 49. Mr. Fiorentino arrested Martin for no other reason than Mr. Fiorentino wanted to conduct an investigation to see if Martin *could be* arrested for his impaired driving. See *Order re: Municipal Appeal* at p. 5:8-18. As a matter of law Martin's arrest took place in the absence of probable cause and Mr. Fiorentino possessed no authority to detain Martin. See *Graham, Updegraff, supra.* Following the illegal detention, police

conducted an illegal investigation that resulted in the collecting the evidence used to charge and convict Martin.

Unlike the Defendant in *Updegraff*, Martin was not unresponsive or otherwise engaging in behavior that generated in Mr. Fiorentino a concern for Martin's wellbeing. Instead Martin was coherent if even uncooperative, but then citizens are not duty-bound to be cooperative in an illegal effort to be detained. Mr. Fiorentino never observed beer cans strewn about the vehicle, perceived slurred speech, noted blood shot eyes, smelled an odor of an alcohol, or observed any other indicia of impairment as outlined in *Updegraff*. After being threatened with deadly force, Martin, like any reasonable person, ceased his attempts to leave the scene. Importantly, Mr. Fiorentino as a fully trained out-of-jurisdiction peace officer denied to law enforcement dispatch personal knowledge of facts or circumstances giving rise to probable cause for a jailable offense. Of course, the officer's knowledge is the "toggle switch" to probable cause. See *Hulse v. State, Dept. of Justice, Motor Vehicle Div.*, 1998 MT 108, 961 P.2d 75, 289 Mont. 94; *Jess v. State Dept. of Justice, MVD*, 255 Mont. 254, 261, 841 P.2d 1137, 1141 (1992).

As this Court has commented, Mr. Fiorentino did not cease to "be" a trained peace officer when he observed Martin drive through the usual exit to Missoula's downtown parking garage, but he was constrained in his ability to "act" as a peace officer. *Updegraff* at ¶ 49. Understandably, Mr. Fiorentino intuitively believed

Martin's behavior was suspicious, but the district court erred when it determined Mr. Fiorentino's intuition permitted him to act upon this belief by arresting Martin.

B. Mr. Fiorentino's arrest while acting as an out-of-jurisdiction peace officer should be suppressed because private citizens must not take the law into their own hands no matter their training.

The purpose of the private citizen's arrest statute is to grant authority to a non-peace officer to protect public safety. *Updegraff* at ¶ 33. For over 100 years, Montana has expressly rejected vigilantism. *Kroeger v. Passmore*, 36 Mont 501, 510, 93 P. 805, 807 (1908); *cf. State v. Lemmon*, 214 Mont. 121, 128. 692 P.2d 455, 459 (1984) (Vigilante days are over in Montana). The statute does not allow people to take the law into their own hands. *Updegraff* at ¶ 33. Although an out-of-jurisdiction peace officer may perform criminal investigations once a legitimate arrest has been made pursuant to *Updegraff*, the private citizen arrest statute does not allow the out-of-jurisdiction peace officer to conduct forensic tests or searches to otherwise process the arrestee. *Id.* at ¶ 52, see also ¶ 33. In other words, because out-of-jurisdiction peace officers are constrained to the arrest standard set forth in § 46-6-50, before they make an arrest, probable cause must exist and may then be followed by criminal investigative procedures. These out-of- jurisdiction peace officers possessing particularized suspicion must act like any other private citizen in the same circumstances and reach for their cell phones—not their guns.

Mr. Fiorentino merely possessed the same power as any other citizen lacking probable cause but wishing to intervene in observed erratic driving: the power to report Martin to 911. Instead of threatening to pull his cell phone like any other reasonable private citizen, he chose to threaten to pull his weapon. Threatening to pull one's weapon is no longer a power vested in the private citizen and under these circumstances was illegal. See *State v Weidenhoffer*, 286 Mont 341, 347, 950 P 2d 1383, 1386 (1997), § 46-6-501(1).

Rather than follow the law Mr. Fiorentino took the law into his own hands by stopping Martin, arresting Martin, and then having an investigation conducted concerning Martin's erratic driving. An out-of-jurisdiction peace officer may only conduct criminal investigations *after* an arrest founded upon probable cause, or at least after a proper welfare check. *Updegraff* at ¶ 52. If Mr. Fiorentino's efforts to "detain" Martin because he drove through yellow tape and bumped into a barricade is justified, then any private citizen has the power to make arrests for non-jailable such as "suspicious" criminal offenses like running a red light, speeding, failure to signal a turn, or other minor driving offenses that can be used to justify a suspicion of impairment.

Updegraff noted that out-of-jurisdiction peace officers do not have less authority than private citizen, but equally clear is out-of-jurisdiction peace officers have less authority than on-duty, in-jurisdiction peace officers. *Id.* at ¶ 49.

Public policy is not served if out-of-jurisdiction peace officers or even private citizens become a "secret police" and are allowed to circumvent *Bauer* by detaining private citizens facing non-jailable criminal offenses. Here there was a street festival that the district court relied as "evidence" of probable cause. *Order re: Municipal Appeal* p.5:8-11. If true, then the standard for probable cause becomes lowered for every community celebration, football game, or community picnic. The constitutional prohibitions against unreasonable searches become virtually meaningless for those of us who celebrate in our community. Our society must not become subject to any "gun-toting" private security guard vested with the police power of detention for "apparent" impaired behavior who might be "sitting in wait" outside festivals or taverns.

The simple solution in this case is to validate Martin's privacy by suppressing the evidence gather from Mr. Fiorentino's illegal, private citizen's arrest.

II. The district court's finding of fact is clearly erroneous because probable cause that Martin was Driving Under the Influence did not arise until *after* Mr. Fiorentino effected the arrest.

A three-part test exists to determine whether a district court's findings of fact are clearly erroneous. First, findings are clearly erroneous if not supported by substantial credible evidence; second, a court's findings are clearly erroneous if the court has misapprehended the effect of the evidence; or third, a court's findings are clearly erroneous if review of record leaves reviewing court with definite and firm

conviction that a mistake has been committed. *Bauer* at ¶ 12. Under the Order, the district court erred under all three tests.

Substantial credible evidence does not exist because the district court never found evidence of probable cause first because the only positive factual finding by the district court was the presence of Mr. Fiorentino's "suspicion" of impairment. *Order re: Municipal Appeal* at p. 5:8-18. Mere suspicion is never "substantial" which underscores the distinction between probable cause and particularized suspicion. *Order re: Municipal Appeal* at p. 5:8-18. The district court misapprehended the effect of the evidence because even if there were any exigent circumstances, the finding adds nothing to the central factual issue of probable case. Particularized suspicion never substitutes for probable cause no matter the "exigency" of the circumstances. Equally clear is the firm conviction that a mistake has occurred when Montana shifts well-entrenched policy controlling warrantless arrests on something less than probable cause. *State v. Ditton*, 2009 MT 57, ¶ 21, 349 Mont. 306, 203 P.3d 806.

A. The district court erroneously misapprehended the evidence because the facts and circumstances personally known to Mr. Fiorentino *prior* to the arrest were insufficient to warrant a reasonable person to believe Martin was Driving Under the Influence.

The district court *Order re: Municipal Appeal* that Mr. Fiorentino recognized probable cause existed to believe Martin was "impaired" based on:

> ...[Martin] was driving unsafely because he was impaired in some significant way, particularly in light of the fact that alcohol was readily available to patrons during the festival. Fiorentino clearly observed behavior that caused him to **suspect** [Martin] was an impaired driver, and attempted to keep the vehicle and [Martin] contained until Missoula police officers arrived at the scene minutes later to conduct an investigation as to the cause of [Martin's] unsafe erratic driving. (Emphasis added). *Order re: Municipal Appeal* at p. 5:8-18.

It is precisely the power to act upon particularized **suspicion** which is denied private citizens whether or not out-of-jurisdiction peace officers. *Updegraff* at ¶ 52. The district court erred when finding Mr. Fiorentino justified in making the arrest when he merely "**suspect**[ed]" Martin was impaired.

The district court found as a matter of fact and after all the testimony and evidence Mr. Fiorentino was left with mere *suspicion* that Martin was impaired. *Id.* Mere suspicion, no matter the surrounding circumstances, fails to rise to the level of probable cause and therefore Martin's arrest was illegal.

B. The district court misapprehended the effect of the evidence by confusing circumstances requiring immediate arrest as adding to the facts of probable cause within the personal knowledge of Mr. Fiorentino that an arrestable crime had been committed.

The district court misapprehended the effect of the evidence when it asserts probable cause for impairment existed because Martin was "driving unsafely" before Mr. Fiorentino even approached the car. The district court entered

extraneous findings touching on its analysis of probable cause: 1) the ready availability of alcohol and, 2) the attempt to contain the vehicle. *Order re: Municipal Appeal* at p. 5:8-18. The Court's finding of "read[y] availability" of alcohol implies that anytime alcohol is available and "unsafe driving" will yield probable cause empowering each of us as private citizen to arrest one another using the threat of deadly force. This conclusion borders on the extreme because our society is fraught with both alcohol and unsafe moving violations. Access to alcohol in Montana is ubiquitous in every community of the state and a common component of community celebration or community picnic. These facts are not "...sufficient to warrant a reasonable person to believe that someone is committing or has committed an offense." *State v. Ditton*, 2009 MT 57, ¶21, 349 Mont. 306, 203 P.3d 806.

"Clearly observed" behavior does not increase the indicia of suspicion, but merely restates that Mr. Fiorentino concluded that Martin was driving unsafely by breaching the tape and bumping into the barrier, a fact pattern that was no more than careless driving, certainly not reckless driving or vehicular assault.

Finally, the district court noted that Mr. Fiorentino "attempted to contain" the vehicle. This finding begs the question because the issue of "detention" or "containment" is nothing more that code language for "arrest." Moreover, Martin respectfully submits that our society has not deteriorated to the point that we as

citizens, must abide by one another's commands merely because such commands are issued.

Taken together, these "facts" do not give rise to probable cause. At best, these extraneous facts identify the "circumstances" that might justify an immediate arrest provided probable cause exits. § 46-5-501(1). The only substantive fact in the record was Mr. Fiorentino's observation of Martin's driving that gave rise to his suspicion of impairment. *Bauer*, *Graham*, and *Updegraff*, *supra*, all point to the limitations of arrest for the mere particularized suspicion of traffic violations.

In addition, the record belies any circumstance requiring immediate arrest because from the beginning Martin was charged with a non-jailable offense – Careless Driving. He was not charged with a high misdemeanor based upon Mr. Fiorentino's observations, but instead upon the criminal investigation conducted by in-jurisdiction peace officers. Moreover, Mr. Fiorentino, a fully trained police officer, never related facts or circumstances that suggest, much less prove, a serious traffic event or even impairment in driving – because he could not. No charge was filed for reckless driving, excessive speed, or vehicular assault. Martin merely breached a barrier tape and bumped into a barrier. The evident purpose of Mr. Fiorentino's arrest of Martin was his instinctual desire to conduct an investigation, yet as an out-of-jurisdiction peace officer Mr. Fiorentino never possessed the authority to act upon this instinct. *Updegraff* cf. *Graham*, *supra*.

Many causes other than impairment can be attributed to a person crossing temporary caution tape or bumping into temporarily erected barricades which surround the normal exit from Missoula's downtown parking garage. Perhaps the barrier could not be seen through no fault of driver. Perhaps the vehicle's gears slipped. Perhaps the conduct was mere carelessness which was discovered on bumping the barrier. Impairment due to any cause, much less a criminal cause, is not established by these facts, which once again underscore the need for investigation — a power exclusively vested in on-duty peace officers. If careless driving rises to the level of probable cause, then given the "availability" of alcohol, so do all moving traffic violations and our citizenry should be encouraged to arrest one another by threatening deadly force for any moving violation.

C. The record leaves a firm conviction that a mistake has occurred because the facts and circumstances of probable cause found by the district court were not personally known to Mr. Fiorentino.

Finally, the district court mistakenly ignored Mr. Fiorentino's personal knowledge in its pursuit of probable cause because the record shows that Mr. Fiorentino could not tell identify the cause of Martin's "unsafe driving." As the district court concedes, Mr. Fiorentino's knowledge was limited to mere suspicion. *Order re: Municipal Appeal* at p. 5:8-18. The district court buttresses the absence of probable cause by relying unrelated facts that are pertinent to an immediate

arrest, the second element of the statute. *Id.* At best, the relevance of these facts identifies circumstances that require immediate arrest but not probable cause as mandated by the statute. § 46-6-501(1).

No inferential facts can be imputed to Mr. Fiorentino when he explained to law enforcement dispatch the facts and circumstances personally known to him and while on scene expressed ignorance about Martin's impairment and its cause. Appendix 2: *Martin's District Court Reply Brief.*, Exhibit A (911 call @ min 0:54). Probable cause is grounded in the observer's personal observations and not speculation. See *Ditton*, *supra*, ¶ 21.

The Court's finding about Martin's impairment simply is unsupported by any facts personally known to Mr. Fiorentino. All Fiorentino knew was that Marin breached the yellow tape barrier and bumped into the barrier. The district court cannot substitute its judgment of facts and circumstances for the expressed knowledge of the arresting officer otherwise the Court fails to maintain its objectivity and becomes an advocate.

At the core of the district court's analysis is that Martin was arrested for suspicion of impaired driving. *Order re: Municipal Appeal* at p. 5:8-18. Montana has not yet lowered the standard for warrantless arrests to particularized suspicion by armed private citizens, no matter how well trained. Montana citizens are not

police officers empowered to arrest willy-nilly on suspicion. The district court's order must be reversed.

CONCLUSION

The *Updegraff* Court left unanswered whether an investigation by an out-of-jurisdiction peace officer founded upon particularized suspicion is a proper exercise of an out-of-jurisdiction peace officers arrest authority under § 46-6-502(1). *Graham* limits on-duty peace officers from arresting for mere particularized suspicion, suggesting that out-of-jurisdiction peace officers are similarly so restrained. *Bauer* limits on-duty peace officers from arrest for non-jailable offenses, suggesting that out-of-jurisdiction peace officers are similarly so restrained. This Court should take Martin's invitation to synchronize *Updegraff*, *Graham*, and *Bauer* limiting out-of-jurisdiction peace officers' to act upon particularized suspicion in making an arrest for a non-jailable offense.

Montana's jurisprudence requires clarification that out-of-jurisdiction peace officers do not have authority under Montana's citizen arrest statute to perform criminal investigations based upon particularized suspicion. Like a private citizen, the out-of-jurisdiction peace officer must have probable cause to arrest. The record reflects that at worst, Martin was witnessed driving carelessly. Martin disregarded a private citizen's command to stop, a perfectly legitimate behavior. Martin legitimately refused to comply with commands of a private citizen until threatened

with violence. Montana has rejected vigilante behavior and the out-of-jurisdiction peace officer, just like any other private citizen, must have probable cause before arresting another person for suspicious activity. The mere observation of "unsafe" driving amounting to nothing more than Careless Driving does not constitute the level of evidence necessary for private citizens and out-of-jurisdiction peace officers to arrest. A mere moving violation does not constitute probable cause sufficient to warrant arrest; it constitutes mere particularize suspicion. On-duty peace officers may have reason to stop and investigate, but out-of-jurisdiction peace officers do not.

Alternatively, the district court misapprehended evidence when it imputed probable cause in in the absence of more than erratic driving, particularly when Mr. Fiorentino expressly disavowed knowing if Martin was intoxicated. In doing so, the district court became an advocate and failed to apply the law of the State of Montana. Martin was illegally arrested by Mr. Fiorentino and Martin's Motion to Suppress should be granted.

Since the arrest was not based on probable cause, the after-acquired evidence of probable cause was obtained illegally and must be suppressed.

DATED this 21st day of November, 2013.

James P. O'Brien
Attorney for the Defendant and
Appellant

CERTIFICATE OF COMPLIANCE

In accordance with M. R. App. P. 11(4) (e), the undersigned certifies that the text is double spaced, except for quotations, which are singled space; the text is proportionally spaced using Times New Roman 14 point size font; and, the total word count of the text of this brief, exclusive of the Table of Contents and Table of Authorities, is 5,247 words.

James P. O'Brien
Attorney for the Defendant and
Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have filed a true and accurate copy of the foregoing APPELLANT'S OPENING BRIEF with the Clerk of the Montana Supreme Court; and, that I have served true and accurate copies of the foregoing APPELLANT'S OPENING BRIEF upon each attorney of record.

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Dated this 21ST day of November, 2013

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Appellant